

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE SAGE STORES COMPANY, a Corporation, and
CAROLENE PRODUCTS COMPANY, a Corpora-
tion, *Petitioners*,

against

THE STATE OF KANSAS, ex rel. A. B. MITCHELL (Sub-
stituted as Attorney General), *Respondent*.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 745

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent's Supplemental Statement

Petitioners' summary of matters involved omits certain facts which respondents deem necessary to be shown in the interest of a clear understanding of the issues.

Carolene is packaged in cans of the same size as evaporated milk, and is otherwise packed similarly to evaporated milk. (Findings of Fact 28, Abs. 507.)

Carolene closely resembles evaporated whole milk in

taste, odor, consistency, and appearance — the average consumer could not distinguish between them by taste, smell or appearance. (Findings of Fact 33, Abs. 509.)

In most instances grocers display the product alongside or near evaporated milk. (Findings of Fact 31, Abs. 508.)

Housewives call the product "milk," as do retail grocers. (Findings of Fact 38, Abs. 509.)

Carolene is actually advertised and sold to consumers as and for evaporated milk. (Findings of Fact 34, Abs. 509, Conclusions of Law 11, p. 522.) Carolene is used as a substitute for milk and cream and has no other use. (Finding of Fact 38, Abs. 511.)

The petitioner, Carolene Products Company, furnishes recipe booklets for distribution to consumers, which carry this statement:

"Carolene can be used for all culinary purposes wherever you now use whole milk, cream, whipping cream or a canned milk." (Finding of Fact 36, Abs. 511.)

Filled-milk is made from milk from which the butterfat has been removed. The butterfat so removed is replaced with vegetable oil. (Finding of Fact 26, Abs. 505.) While nothing is added to petitioners' product to give it an artificial taste or color, or to give it a resem-

blance to any other food (Finding of Fact 33, Abs. 509). the hydrogenated cottonseed oil used in the product is rendered colorless, odorless and tasteless by a process of bleaching and destearinization of the refined cottonseed oil, and is hydrogenated by a process of adding hydrogen to the unsaturated parts of the fat. (Finding of Fact 12, Abs. 497.)

Since the principal constituents of the product is skimmed milk and hydrogenated cottonseed oil, which is odorless, tasteless and colorless, the product necessarily closely resembles evaporated whole milk in taste, odor, consistency and appearance. (Finding of Fact 33, Abs. 509.) It is that which is taken out of the oil that renders it useful in petitioners' product and gives it the appearance, odor, taste and consistency of the genuine product.

While the separate ingredients of Carolene, *i.e.*, skimmed milk, cottonseed oil and vitamins, were found to be wholesome, there was no finding by the court below that petitioner's product is harmless when used as it is used (as stated in the last paragraph on page four of petitioners' petition). The fact that a food is wholesome and nutritious does not mean that it is of itself an adequate or complete food. Diseases can be caused by what

the diet does not contain, as well as what it does contain. (Findings of Fact 17, Abs. 500.)

Thus, while Carolene contains nothing of a toxic nature, it is deficient or wholly lacking in essential nutrients, or growth-promoting properties found in milk, but which are not found in Carolene. (Findings of Fact 53, Abs. 519.)

A description of these essential nutrients not found in petitioners' product and their need in the human diet is set out in the findings of fact. (Finding of Fact 41, 44 to 48, Abs. 514, 515; Findings of Fact 51, Abs. 517.)

Milk is a more complete food than any other, and cows milk is the best known substitute for breast milk for a human infant. (Findings of Fact 20, Abs. 502.)

The deficiencies in Carolene, as compared to evaporated whole milk, are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet.

When Carolene is used as a substitute for whole milk or evaporated whole milk in the diets of infants and children, who do not consume a varied diet, such deficiencies are not made up, and the diet is partially inadequate.

The court below found, as a fact, that Carolene does get

into the channels of infant nutrition. (Findings of Fact 53, Abs. 519.)

Approximately twenty-five percent of school children suffer from malnutrition. The principal deficiency is foods rich in nutrients. (Findings of Fact 39, Abs. 512.)

In an original action in the supreme court of Kansas findings of fact, made by the commissioner, are advisory, and, when challenged by objections, it is the responsibility of the supreme court of the state of Kansas to determine the facts, and reach an independent conclusion thereon. (Supreme Court opinion, Abs. 659.)

The findings of fact and conclusions of law made by the commissioner appointed by the supreme court (Abs. 493 to 522), were adopted by the supreme court of Kansas in its opinion (Abs. 659, 660 and 661), and the supreme court attached the commissioner's findings of fact to its opinion as a part thereof (Abs. 653-654, 680 to 702), and supported the commissioner's conclusions of law by citing cases following said conclusions, as set forth in its opinion.

It is upon the basis of the facts found by the supreme court of Kansas that its holding in the instant case was made. In the opinion starting at page 650 of the abstract, the court stated: (Abs. 660.)

"For the purpose of determining the constitu-

tionality of the law in question it is immaterial whether we believe defendant's product when considered as a whole is inferior, equal or superior to whole milk or evaporated whole milk if substantial disagreement in fact exists with respect to the inferiority of the product as compared with whole milk or evaporated whole milk, and the legislature has some basis for believing a filled-milk product is likely to be sold or is susceptible of being sold as and for whole milk or evaporated whole milk with the result that the public may be deceived thereby. In other words, in the view we take of the law governing this case the sale of a filled-milk product, although wholesome and nutritious, may be constitutionally prohibited as well as merely regulated if the legislature has some basis for believing the product is inferior to whole milk or evaporated whole milk and that the sale of the product offers an opportunity for fraud and deception and that prohibition rather than mere regulation of its sale is necessary for the adequate protection of the public health or general welfare. We think there was a sufficient basis for the exercise of legislative judgment as to a filled-milk product and the remedy adopted to effect the legislative purpose."

Petitioners filed a motion for rehearing in the Kansas court, stating as one ground therefor that Justice Parker was disqualified. (Abs., 705.) Petitioners did not object to Justice Parker sitting at the time of the submission, and oral argument of the case to the supreme court. (Abs. 707.) Respondent objected to a rehearing upon peti-

tioners' ground that Justice Parker was disqualified, for the reason that petitioners had waived any objection they might have had by not objecting to his sitting at the time of the oral argument and submission of the case, and respondent further objected for the reason that Justice Parker had never personally participated in the case, either in connection with the pleadings, the taking of testimony, the briefing of the case, or in consultations in connection therewith, and that there was no basis in fact for any bias, prejudice or fixed opinion respecting the facts or law or issues involved, and that he had no private, personal or pecuniary interest in the case. (Abs. 754.)

Respondent further objected for the reason that there was no other tribunal under the constitution or statutes of Kansas that could hear and decide the issue, and because of necessity it was Justice Parker's duty to sit in decision of the case. (Abs. 755.)

The facts regarding Justice Parker's participation in the case were shown and supported by affidavit. (Abs. 800 to 807.)

The Board of Agriculture, charged with enforcement of the law in question, decided a quo warranto action should be instituted to enforce the law, and requested the attorney general to permit such action to be filed, which

the attorney general authorized. All matters in connection with the handling of the case were done by special counsel. (Abs. 800 to 807.)

The opinion of the court denying the motion for a rehearing sustained respondent's contentions. (Abs. 821 to 834.)

Summary of Argument

- I. The petition for a writ of certiorari should be denied because petitioners do not show any special or important reason for granting a writ of certiorari. There is no federal question of substance involved not heretofore determined by this court. The Supreme Court of Kansas decided all issues in accordance with applicable decisions of this court.
- II. The prohibition of Sec. 65-707 (F) (2), General Statutes of Kansas for 1935 is a valid exercise of the State's police power to preserve the public health and to prevent fraud and deception. As applied to petitioners' product the statute is neither arbitrary nor unreasonable.
- III. Petitioners are not denied due process of law by reason of Justice Parker having taken part in the decision of the Kansas court. The facts proven and found by the court show that he was not disqualified under any statute or common law rule, nor did his participation invade the essentials of due process.
- IV. Because of the various reasons herein set forth petitioners have not shown themselves entitled to have this court issue a writ of certiorari to the Supreme Court of the State of Kansas, and said request for a writ should be denied.

Brief and Argument

I

The Petition for a Writ of Certiorari Should be Denied Because Petitioners Do Not Show Any Special or Important Reason for Granting a Writ of Certiorari. There is No Federal Question of Substance Involved Not Heretofore Determined By This Court. The Supreme Court of Kansas Decided All Issues in Accord With Applicable Decisions of This Court.

The constitutional question with reference to the power of the State to prohibit the sale of food products, even though they be wholesome and nutritious, has been settled by this court.

The Fifth Amendment forbids the federal government from denying to any person life, liberty or property without due process of law. The Fourteenth Amendment forbids a State to deny any person life, liberty or property without due process of law. Decisions of this court under the federal filled-milk law are applicable, as well as decisions of this court on state filled-milk laws heretofore decided by this court. Therefore, there is no merit in petitioners' statement that there is a federal question of substance involved not heretofore decided, or that the decision of the Kansas court was not in accord with applicable decisions of this court. No special or important rea-

son is suggested by petitioners why such former decisions are not applicable.

The power of the State to bar the sale of filled-milk, even if such be conceded as wholesome, nutritious and properly labeled, has been sustained by this court, and no new federal question of substance is presented by petitioners.

The effect of the statute of Ohio was to bar the sale of a compound of evaporated skimmed milk and vegetable oils, called "Hebe." The Ohio statute was assailed as violative of the Fourteenth Amendment on substantially the same grounds urged by petitioners against the statute involved in this case. There, as here, it was claimed the product was wholesome, nutritious and properly labeled. In this respect the petitioner's claims in this case go no further than the claim of appellants in the Hebe case. This court held the Ohio statute good under the Fourteenth Amendment, (*Hebe v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 135, 63 L. Ed. 255 [1919]), saying—

"We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. *The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature is not to be denied simply because some innocent*

articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.' *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204. If the character or effect of the article as intended to be used be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of judges, upon the issue which the legislature has decided.' *Price v. Illinois*, 238 U. S. 446, 452. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357. The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends. See further *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 288." (Emphasis supplied.)

This court has sustained the *Federal Filled-Milk Act* (U. S. Code Ann. Title 21, Sees. 61 to 63) which prohibits interstate shipments of milk and oil mixtures which are in the semblance of milk. (*U. S. v. Carolene Products Co.*, (304 U. S. 144, 82 L. Ed. 1234 [1938])). In that case this court affirmed the doctrine of the *Hebe* case, saying:

"Twenty years ago this Court, in *Hebe Co. v. Shaw*, 248 U. S. 297, 63 L. Ed. 255, 39 S. Ct. 125, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk,

compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

"We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality." (p. 148.)

Furthermore, the addition of vitamins to the prohibited product does not take it out from under the law. (*Carolene Products Co. v. Wallace*, 27 Fed. Supp. 110 [1939], affirmed 307 U. S. 612; *Carolene Products Co. v. Wallace*, 30 Fed. Supp. 266, 308 U. S. 506, 84 L. Ed. 433.)

The Kansas statute, here considered, is thus demonstrated to be neither arbitrary nor capricious. In the following cases, all determined since this Court decided *U. S. v. Carolene Products Co.*, 304 U. S. 144, state filled-milk laws have been sustained:

Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S. W. 2d 23;

Carolene Products Co. v. Mohler, 152 Kan. 2, 102 P. 2d 1044 (1940);

Setzer v. Mayo, 150 Fla. 734, 9 So. 2d 280;

Carolene Products Co. v. Hanrahan, 291 Ky. 417, 164 S. W. 2d 597 (1941).

Also, the federal statute has been again upheld on January 10, 1944, by the Court of Appeals of the 4th Circuit. (*U. S. v. Hauser et al.*, 140 F. 2d 61.)

In view of the foregoing, and particularly on the authority of the *Hanrahan* case and *U. S. v. Carolene* case (1938), *supra*, it is submitted that the constitutionality of the statute in question is settled with reference to the Fourteenth Amendment. The petition raises no new substantial question under the Fourteenth Amendment, and should, for that reason, be denied.

The facts proven and found by the Kansas court that Justice Parker had no bias, opinion or personal interest and was not disqualified by statute or common law and that in case of necessity it was his duty to participate in the decision presents no grounds for granting of the writ. *Evans v. Gore*, 253 U. S. 245, 64 L. Ed. 887.

II

The Prohibition of 65-707 (F) (2) General Statutes of Kansas for 1935, is a Valid Exercise of the State's Police Power to Preserve the Public Health and to Prevent Fraud and Deception. As Applied to Petitioners' Product the Statute is Neither Arbitrary or Unreasonable.

A

The petitioners summarize their argument under this division as follows:

"Since Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits without fraud on the public, Section 65-707 (F) (2) General Statutes of Kansas 1935, which bars the sale of such product, violates the Fourteenth Amendment to the Constitution of the United States."

The question of the power of a State to regulate or to prohibit the sale of an article which the legislature deems detrimental to the public health or welfare, has been considered by this court in many cases. The rule is established that there is a presumption in favor of the constitutionality of such statutes, and they will be sustained if any set of facts can reasonably be conceived which would sustain the legislative acts. (*O'Gorman and Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. Ed. 224 (1931); *Carolene Products Co. v. Mohler*, 152 Kan. 2, 102 P. 2d 1044 [1940].)

This court has settled the question of the power of a state to bar the sale of a food compound composed of condensed skimmed milk and vegetable oil, where such product simulates and is palmed off as a whole milk product. And this power of the State exists notwithstanding the wholesome character of such compound, or the character of its labeling. (*Hebe v. Shaw*, 248 U. S. 297, 63 L. Ed. 255 [1919].) We submit that the Hebe case answers

fully the arguments of petitioners which contest the power of the State, in a proper case, to prohibit the sale of a food product which may be wholesome and properly labeled.

This court has reiterated the above principle with reference to the power of Congress, or its agencies, to prohibit in interstate commerce food products, notwithstanding their wholesomeness, which may be generally sold in such manner as to deceive the public. (*Federal Security Administrator v. Quaker Oats Co.*, 63 S. Ct. 589, 87 L. Ed. 541 [1943]; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 82 L. Ed. 1234 [1938].)

In the case last cited this court held specifically that the federal filled-milk act is a valid exercise of the power of Congress as applied to a filled-milk composed of condensed skimmed milk and coconut oil.

Thirty-three states, as well as the United States, have enacted laws which prohibit the manufacture and sale of filled-milk, and its introduction into commerce. (Citation to these statutes appears in the footnote to *U. S. v. Carolene Products Co.*, 304 U. S. 144, 84 L. Ed. 1234.) In three states such statutes were held unconstitutional prior to the 1938 decision of this court in *U. S. v. Carolene Products Co.*, supra. (*People v. Carolene Products Co.*, 345 Ill. 166, 177 N. E. 698; *Carolene Products Co. v.*

Thomson, 276 Mich. 172, 267 N. W. 608; *Carolene Products Co. v. Banning*, 134 Neb. 429, 268 N. W. 313.)

The supreme courts of seven states have sustained the constitutionality of laws substantially similar to the Kansas statute. (*State v. Emery* [Wise.], 178 Wise. 147, 189 N. W. 564; *Hebe v. Calvert* [Ohio], 246 Fed. 711 [1917]; *Carolene Products Co. v. Harter* [Pa.], 329 Pa. 49, 197 Atl. 627, 219 A. L. R. 235 [1938]; *Poole & Creber Markets v. Breshears* [Mo.], 343 Mo. 1113, 125 S. W. 2d 23 [1939]; *State, ex rel. McKittrick, v. Carolene Products Co.*, 346 Mo. 1049, 144 S. W. 2d 153 [1940]; *Carolene Products Co. v. Mohler*, 152 Kan. 2, 102 P. 2d 1044 [1940]; *Setzer v. Mayo* [Fla.], 150 Fla. 734, 9 So. 2d 280 [1942]; *Carolene v. Hanrahan* [Ky.], 291 Ky. 417, 164 S. W. 2d 597 [1941].)

It should be stated that the Kansas, Florida and Kentucky cases, above cited, considered a "Carolene" consistency of skimmed milk and a vegetable oil to which was added the vitamins "A" and "D." The Kentucky decision, sustaining the validity of that state's law, dealt with a product identical in all respects to the present product of petitioners containing skimmed milk, cotton seed oil and vitamins "A" and "D."

We submit that the law is settled as to the right of a State to bar filled-milk, even if it be conceded to be

wholesome, and if its label concededly states the truth. All the cases supporting these prohibitory laws are grounded on the proposition that filled-milk may reasonably be deemed to be detrimental to the public health, and to produce deception upon consumers.

But petitioners pleaded, and have argued, that they have a "new product," or that they have so changed the old and forbidden article as to remove it from the prohibitive effects of the statutes involved.

While it is our contention that the rule in *Hebe v. Shaw*, supra, controls this case, the insistence of petitioners that they are outside the rule of the Hebe case, by reason of a change in their product, will be considered.

In the Hebe case the product consisted of a mixture of coconut oil (6%) and condensed skimmed milk (94%). The resultant compound closely resembled the familiar evaporated whole milk. In this case Carolene consists of cottonseed oil (6%) and condensed skimmed milk (94%) to which are added vitamins "A" and "D."

Carolene is put up in cans which are the same size as standard evaporated milk cans, and is otherwise packaged similarly to that of evaporated milk. (Findings of Fact 28, Abs. 507.) It cannot be distinguished by the layman from evaporated milk with reference to its taste, color,

odor and consistency. (Findings of Fact 33, Abs. 509.) It is displayed in stores along with evaporated milk and is advertised to the public as "milk." (Findings of Fact 31, Abs. 508; Findings of Fact 34, Abs. 509.)

In the trial of this cause before the commissioner of the supreme court of Kansas the petitioners were afforded full opportunity to present facts which would demonstrate that their "new product" overcame the evils against which the statute was directed.

The Mohler case held the Kansas law, as applied to petitioner's product, which then consisted of a mixture of evaporated skimmed milk, coconut oil, and vitamins "A" and "D," was barred by the Kansas statute, which the court held constitutional and valid as a public health measure, and as a proper safeguard to prevent fraud on consumers.

Petitioners' contentions are not the facts found by the Kansas court. At the very outset we are met by the contention of the petitioners that their product is "wholesome and nutritious, fairly labeled, and sold on its merits without fraud on the public." That identical contention was made in *Hebe v. Shaw*, *supra*, in 1919, where there was an attempt to sell skimmed milk and coconut oil in violation of the Ohio statute. This is also the same contention

made by Carolene Products Company when it attempted to enjoin the Secretary of Agriculture and the Attorney General of the United States from enforcing the federal law against its shipment of skimmed milk and coconut oil in interstate commerce in the case of *Carolene Products Co. v. Wallace*, 27 Fed. Supp. 110, 307 U. S. 612, and *Carolene Products Co. v. Wallace*, 30 Fed. Supp. 266, 308 U. S. 506, 84 L. Ed. 433.

In both instances the court held that if the character or effect of an article, as intended to be used, be debatable, the legislature is entitled to its own judgment, and its judgment cannot be superseded by the views of the court.

In the case of *U. S. v. Carolene Products Co.*, 304 U. S. 144, 82 L. Ed. 1234 (1938) this court, in discussing the issue there presented, made reference and took judicial notice of the committee reports of Congress and committee hearings. The court took cognizance that both committees concluded as the statute itself declared that the use of filled milk is a substitute for pure milk, is generally injurious to health, and facilitates fraud on the public. The committees there found generally that filled-milk compounds resembled milk in taste and appearance, and are distributed in packages resembling those in which pure condensed milk is distributed; *that the use of filled-*

milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces disease which attends malnutrition; that compliance with branding and labeling requirements does not prevent a widespread use of such product as a substitute for pure milk, and that said filled-milks are sold and purchased as and for the genuine article, and that said filled-milks are deficient in essential nutrients. (Emphasis supplied.)

This court can take judicial notice of the proceeding of the Committee on Agriculture, House of Representatives, 27th Congress, First Session, committee hearing on the Federal Filled-Milk Act (H. R. 6215) in which the discussion with regard to the contentions of those opposing the act was under consideration, to wit, that the milk was wholesome and nutritious.

The contentions of the proponents of the bill are well expressed by answers of Representative Voigt, wherein he said to the committee:

"I will say to you gentlemen that there is nothing poisonous or deleterious in this milk compound. I will say further that I do not object to what the compound contains so much as I object to what it does not contain. The fact that this article is not deleterious, or not poisonous, does not meet the argument. You can mix milk with water and there

is nothing injurious or poisonous about it, but it is considered everywhere in the country that that is a fraud on the consumer."

He further states:

"This substitute does have food value, but the main defect in it is that it has not the food value which is necessary for the growth of children and infants."

He further states:

"The trouble is that this article is sold for milk, and is used for milk, when it does not have the same nutritive elements that milk has, and it is sold, notwithstanding the label, in such a way as to perpetrate a fraud on the consumers of the country."

Representative Lorenzo stated:

"While the filled-milk does not contain any poison, if an ignorant person goes to the stores and buys a can of filled-milk and feeds it to his children, and does not know that his children are getting milk that contains no element of nutrition, his children are being poisoned in an indirect way."

It is evident that when Congress and the Kansas legislature considered filled-milk in 1923 they were not deceived as to the evil which they intended to prevent. They intended to prevent the palming off on the public of an inferior milk compound stripped of elements es-

essential to the diet of the people, and essential for the maintenance of the health of the people, and which article could not be distinguished from the genuine article, and which article was actually sold to and used by consumers as and for the genuine article, not knowing that it did not contain these essentials to health, thereby promoting widespread malnutrition in the country. Those were the facts in 1923. Those are the facts today as found by the commissioner upon the extensive evidence presented in the present case, and which facts were found to be true by the supreme court of Kansas after an independent re-examination of the evidence and the record.

The facts found by the commissioner and the Kansas court show that the word "wholesome," as used in the field of nutrition, and in the findings, means a food or nutrient which can be used by the body as distinguished from a toxic food that cannot be used by the body; that "nutrition" means "containing food value of kind and quantity of nutrients"; that the use of the words "wholesome and nutritious" does not mean "adequacy." A food may be wholesome and nutritious, and yet be incapable of sustaining human life, and disease can and is caused by what the diet does not contain, as well as by what it does contain. (Findings of Fact 17, Abs. 500.)

The commissioner and the Kansas court found that petitioners' product, of skimmed milk, cottonseed oil, and vitamins "A" and "D," was inferior to evaporated whole milk in at least six different elements essential to health. These elements, found in whole milk, but not found in petitioners' product, are fatty acids, phospholipins, sterols, vitamins "E" and "K," and a superior growth-promoting property in butterfat not contained in cottonseed oil.

o (Findings of Fact 53, Abs. 519.)

These essentials to human nutrition are lacking in petitioners' product. The mere fact that petitioners have added vitamins "A" and "D" to replace vitamins "A" and "D" taken from whole milk when they take off the cream does not make up for the other nutrients taken off with cream and not replaced in petitioners' product. The evil that existed in 1923 still exists. The substitute article is inferior in nutritional value to the genuine article for which it is fraudulently substituted, and the addition of "A" and "D" by petitioners to their product merely makes up some of the deficiencies in said substituted product and, therefore, more available for deceiving the public.

The record in this case, and as found by the Kansas court, shows petitioners' product to be packaged and sold as a substitute for pure milk, and that the public

buys and uses it believing that it is the genuine article by reason of the misleading manner in which it is sold, and because of its resemblance to the genuine article. These same facts existed in 1923, and are true today.

The evidence adduced in this case establishes, and the Kansas court has found, that the evils which attended the sale of petitioners' coconut oil filled-milk still persist as to the present cottonseed-oil product.

B

As applied to Carolene, the statutes is a proper exercise of the State's power to protect the public health. The court in this case found that Carolene is, in fact, deficient in nutrients which are required in the diet of infants. Finding of Fact 53, Abs. 518 and 519, states:

"(53) The expert witnesses who testified in this case include chemists, biochemists, physiologists, professors in medical school, public health authorities and physicians specializing in pediatrics and nutrition. They are among the most eminent men in America in their fields. Their ability and integrity are not open to question.

"In the foregoing Findings, some of the respects in which such experts disagree have been pointed out for the reason that (under the view the Commissioner takes of the law) the fact that the experts do so disagree is itself a material fact. Such differences of opinion are due in part to the recognized

human tendency to draw different conclusions from the same facts and in part to the fact that the experts were testifying on subjects concerning which the store of knowledge is still far from complete. New discoveries are constantly being made. At the time the evidence was being taken, an important rat experiment was being conducted on a larger scale than any heretofore attempted.

The case, however, must be determined in the light of present-day knowledge, as shown by the evidence introduced.

"Defendant's product is wholesome, nutritious and harmless, *in the sense that it contains nothing of a toxic nature, but it is inferior to evaporated whole milk in the content of fatty acids, phospholipins, sterols and Vitamin E and K, all of which are essential in human nutrition, with the probable exception of Vitamin E in the diet of infants. In addition, evaporated whole milk contains a superior growth-promoting property, found in butter fat and not in cottonseed oil, essential to the optimum growth of infants.*

"These deficiencies in defendant's product, as compared to evaporated whole milk, are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet. *When defendant's product is used as a substitute for whole milk or evaporated whole milk in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and the diet is partially inadequate. Defendant's product does 'get into the channels of infant nutrition.'*" (Emphasis supplied.)

Since, under the facts in this case, it is established beyond dispute that ~~Carolene~~ is inferior to whole milk, and that it is deficient in certain required nutrients found in milk, the statute of Kansas, which prohibits the sale of this product, cannot be said to be arbitrary or without substantial basis in fact.

This is particularly true since the deficiency in Carolene would be manifested in babies and small children who do not consume a varied diet, but who, of necessity and custom, rely upon milk as their principal food.

Whether the sale of this inferior substitute (Finding of Fact 53, Abs. 518 and 519), which the mother cannot distinguish from familiar forms of milk (Finding of Fact 33, Abs. 500), should be regulated or prohibited to best serve the public interest, is a question for the legislature, and not, as petitioners contend, for the court. (*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed 253 [1888]; *Carolene Products Co. v. Hanrahan*, supra [1943].)

We submit that the statute is sustainable, when applied to petitioners' present product, as a valid exercise of the power of the State of Kansas to strike against a real, and not a fancied threat, to the health of the people of the State.

As applied to Carolene, the statute is a proper exercise of the State's power to prevent deception upon the public. In the Hebe case Justice Holmes pointed out that the addition of the oil to the condensed skimmed milk served a purpose to make "the cheaper and forbidden substance more like the dearer and better one, and thus at the same time more available for a fraudulent substitute."

The "new" Carolene overcomes none of the objections raised against Hebe so far as color, taste, odor or appearance are concerned. It cannot be distinguished in these respects from whole evaporated milk. The product is packed in cans identical in size and shape to the familiar milk cans, and it is established that the product is advertised and sold by grocers to consumers as and for milk, and that consumers buy in the belief they are getting milk. The label on the can, as the facts show, does not protect consumers against this widespread deception, and it was upon this basis that this court in the Hebe case held that a product so susceptible to fraudulent dealings could not be saved by its label. This principle has been many times affirmed in the state cases cited above, and by this court in *U. S. v. Carolene Products Co.*, supra.

Petitioners contend they are not guilty of fraud or deception. The Kansas court concluded (Abs. 663) that it was not material that the defendants intend for their product to be sold for what it really is, and without fraud or deception. Since the product is susceptible of being sold as and for evaporated milk, and is so sold, the legislature has the right in the exercise of its police power to prohibit its sale as an instrument of fraud upon the consumers of the state.

In the case of *Carolene Products Co. v. Mohler*, supra, a similar contention was made. The findings of the court in that case, with regard to the manner of sale and purchase of the product, was like that before the court in this case, and the Kansas supreme court in the case of *Carolene Products Co. v. Mohler*, supra, at page 10 of the opinion, states:

"Defendant was not seeking to prove a case of active fraud, as the term is ordinarily used in the law, but was merely seeking to show what the condition was against which the statute was directed and which condition the legislature no doubt could have conceived would exist if fats or oils such as coconut oil were permitted to be added to whole milk derivatives, and such condition is one of the things which the legislature, in its wisdom, had a right to guard the public against."

We submit that the Kansas statute is sustainable, when applied to petitioners' present product, as a valid exercise of the State's power to protect the public of the State against fraud and deception, and that the danger against which the statute is directed has been demonstrated to be real and substantial, and such as to establish a rational basis for the exercise of legislative discretion.

III

Petitioners Are Not Denied Due Process of Law by Reason of Justice Parker Having Taken Part in the Decision of the Kansas Court. The Facts Proven and Found by the Court Show That He Was Not Disqualified Under Any Statute or Common Law Rule, Nor Did His Participation Invade the Essentials of Due Process.

The facts proven (Abs. 800 to 807) and found by the court (Abs. 822 to 825) showed that C. Glenn Morris, an Assistant Attorney General under Clarence V. Beck, Attorney General in 1938, was assigned to defend the Secretary of the Board of Agriculture and Dairy Commissioner in the case of *Carolene Products Co. v. Mohler*, 152 Kan. 2, 102 P. 2d 1044, decided in the summer of 1940. After that decision Carolene Products Company eliminated from its product coconut oil, and in its stead used cottonseed oil, which cottonseed oil product it then began to sell in Kansas. The Board, late in 1940, asked Parker to

file a quo warranto action in the name of the State of Kansas, for the purpose of enforcing the law in question, which had already been upheld by the Kansas court. C. Glenn Morris resigned in January, 1941, from the Attorney General's office, but was appointed a special assistant by Attorney General Parker and employed by the Board of Agriculture to act as counsel in the present case. He prepared the petition and all subsequent pleadings, and signed his name and that of the Attorney General to all the pleadings, briefs and papers, in connection with the case. Parker was not consulted regarding pleadings, evidence or the facts, or law upon the issues presented in the case.

Under these circumstances the Kansas court in its opinion, denying petitioners' motion for a rehearing (Abs. 825), *State v. Sage Stores Co.*, 157 Kan. 622, at 625, stated:

"From the foregoing uncontradicted facts it is clear Attorney General Parker did not give the facts nor the legal questions involved in the instant action his personal attention.

"If prior to the filing of the instant action or during its pendency the attorney general entertained a personal opinion relative to the subject matter involved, it did not, under the facts presented, result from his active participation in either of the lawsuits mentioned. Manifestly any view he might have entertained as to the subject matter,

which view was unrelated to his participation in the litigation, could not and did not disqualify him from serving as a justice of this court."

The court further observed (Abs. 827):

"This court on two previous occasions has considered the subject of disqualification of one of its justices who was a former attorney general. In each case, as in this one, the constitutional right to a decision of this court would have been denied if the challenged justice had been held disqualified. (*Barber County Comm'rs v. Lake State Bank*, supra; *Aetna Ins. Co. v. Travis*, 124 Kan. 350, 250 Pac. 1068.)"

and further on the court stated (A. 829):

"There is no contention Mr. Justice Parker is disqualified under the common law rule of pecuniary interest. He is not disqualified by our constitution or statutory provisions.

"There are occasions when a justice, although not legally disqualified, may prefer not to participate in a decision in order to avoid any possibility of suspicion of bias or prejudice. That attitude is commendable and this court has recognized and applied it frequently so long as it did not result in denying to a litigant his constitutional right to have the presented question adjudicated. In other words, preferences frequently serve a good and useful purpose but when they come in conflict with official duty, the former must yield.

"When the instant case came on for oral argument before this court all members thereof were present. *No objection had been made to Mr.*

Justice Parker's participation in the case and he remained on the bench. When the case was reached for conference Mr. Justice Parker voluntarily expressed a preference not to participate in the conference or decision unless his official duties as a member of this court required him to do so. This request was freely granted. He remained in the conference but took no part therein until after it developed his vote was necessary for a decision. The court was of the opinion he was not disqualified to participate and that under the circumstances it was his duty to do so."

In the case of *Brinkley v. Hassig*, 83 F. 2d 351, the rule of necessity was stated as follows:

"From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal."

This court has had before it the question of disqualification of members for direct personal financial interest.

In the case of *Evans v. Gore*, 253 U. S. 245, 40 S. Ct. 550, 64 L. Ed. 887, a question arose in which members of the court were directly interested financially because their

decision would effect their salary. Adverting to this regretful circumstance, the court declined to denounce jurisdiction which appellant was entitled to invoke since: "there was no other appellate tribunal to which under the law he could go."

The situation is the same here. Not only is there no disqualification by reason of bias, opinion, pecuniary interests, or other ordinary reasons that might disqualify, but there is no other tribunal by which the litigants may have their rights determined. The court should not deny them their constitutional right to have a question properly presented adjudicated.

Cases have arisen where all members of the State supreme court have been jointly sued by disappointed litigants. Confronted by the choice of denying the suitor his right of appeal, or hearing it themselves, the courts have heard the appeal. An exhaustive gathering and analysis of cases from many states, and from England and Canada, may be found in 39 A. L. R. 1276.

The Kansas court further observed (Abs. 832):

"Defendants argue if he is permitted to participate in this decision the plaintiff will be the judge of his own lawsuit. The contention is not sound. The sovereign power, the state, and not the attorney general, is the plaintiff. In quo warranto the

state demands the writ from the court through the medium of its chief law officer requiring the respondent to show why it should not be shorn of its powers. In the proceedings the attorney general has no personal interest, direct or otherwise. His personal interest is not affected directly or remotely by the judgment or decree. In such a proceeding he is supposed to be impartial and to seek only the vindication of the rights of the state.

There can be no basis for saying that petitioners were denied due process merely because Justice Parker, when Attorney General, was relator in a quo warranto action. He was vested with the discretion of determining whether he would permit an action in quo warranto to be instituted in the name of the state for the purpose of determining whether corporate powers of a domestic corporation had been abused. The constitutionality of the statute in question had been upheld in the case of *Caroline Products Co. v. Mohler*, supra. After that decision the only subject upon which it was necessary for him to exercise a discretion was the subject of the appropriate method of enforcing the statute, and not whether the statute constituted a valid health measure which could be enforced. The controverted issue now before this court did not pertain at all to the subject on which the Attorney General exercised his discretion deciding that quo

warrahto constituted an appropriate method for the enforcement of the statute.

It is, therefore, submitted that petitioners' request for a writ upon this ground should be denied.

IV

Because of the Various Reasons Herein Set Forth Petitioners Have Not Shown Themselves Entitled to Have This Court Issue a Writ of Certiorari to the Supreme Court of the State of Kansas, and Said Request for a Writ Should be Denied.

In conclusion respondent wishes to point out that petitioners complain in general that, there being a substantial disagreement as to the character and effect upon the public health and welfare of their product as it is used, the court, and not the legislative branch of government, is entitled to determine the public good; that the court, and not the legislature, is entitled to determine whether the evils sought to be suppressed can best be accomplished by regulation or prohibition; that the court, and not the legislative branch of government, whether national or state, should determine the need of the people for inferior substitutes for natural foods; that the court, and not the appropriate legislative branch of government, should determine whether it is wise to take whole milk, a critical

food, from the market, and separate the cream, and use the skimmed milk to make an inferior substitute for whole milk, thereby eliminating a certain amount of whole milk from the market, and creating an amount of skimmed milk which they use. It will be noted, however, that petitioners do not use skimmed milk that might otherwise go to waste, but create skimmed milk.

In *Carolene Products Company v. Mohler*, supra, at page 8, the supreme court of Kansas stated:

"If, on the evidence in the case, there is room for a reasonable difference of opinion as to whether the products outlawed by the statute are attended with evil consequences to the public, either in the health of the people or through fraud and deception, in the purchase and use of products, the judgment of the legislature as expressed in the statute may not be superseded by the views of this court."

In *Hebe v. Shaw*, supra, where the Fourteenth Amendment was involved, this court stated:

"If the character or effect of the article as intended to be used be debatable the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of judges, upon the issue which the legislature has decided."

In *U. S. v. Carolene Products Company*, 304 U. S. 144, this court stated:

"Twenty years ago this court, in *Hebe Co. v. Shaw*, 248 U. S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made by condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. . . . We see no persuasive reason for departing from that rule here, where the Fifth Amendment is concerned: . . . (P. 148.)

This court, taking judicial notice of congressional committee reports, that the use of filled milk as a substitute for milk is generally injurious to health, and perpetrates fraud on the public, again stated in *U. S. v. Carolene Products Company*, *supra*, page 149:

"There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence."

This court then concluded, on page 154:

" . . . that the question is at least debatable whether commerce in filled-milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury, can be substituted for it."

Petitioners state that the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49, completely overruled the case of *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed.

253. This court has never recognized the Powell case as being overruled by the Schollenberger case. In the Schollenberger case this court held a state could not prohibit importation into the state of an article recognized by Congress to be wholesome and a proper article of commerce, and distinguished the facts there from those of the Powell case. The Powell case was also cited in the recent case of *U. S. v. Carolene Products Company*, 304 U. S. 144, with approval. The Powell and Hebe cases have both been cited by this court with approval continuously down to the present time.

Petitioners further attempt to distinguish the present case from *U. S. v. Carolene Products Company*, on page 26 of petitioners' brief, by stating that the federal act was held constitutional only by reason of the fact that the company's demurrer.

"Admitted for the purpose of that case that the product there involved . . . was injurious to public health and a fraud upon the public."

It is submitted that this court in the *Carolene Products Company* case was not sustained by reason of any admission inferred from the demurrer, the court saying on page 148:

"we might rest the decision wholly upon the presumption of constitutionality. But affirmative evidence also sustains the statute."

The court then took judicial notice of the congressional hearings and reports, which, as heretofore pointed out, showed a factual basis for the legislative discretion, the same as the facts in this case show the factual basis for the legislative discretion.

Petitioners also rely upon the case of *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 70 L. Ed. 654, and suggest that that case should govern here.

The Weaver case was not dealing with nutrition of foods, but with sanitation of quilts and comfortables. It is true that a food can be dangerous to public health because of noxious substances, because of the lack of nutrients, or because it is insanitary. If respondent here contended that cottonseed oil, prior to refining, was unsanitary, but that the facts showed the process of refining removed this insanitary state of cottonseed oil, the Weaver case might be applicable, but such is not the fact in the case before the court. The evidence showed, and the commissioner found, and the supreme court of Kansas sustained the finding, that certain essential nutrients are not in petitioners' product that are contained in the natural well known and widely used product of whole milk. Petitioners do not deny this is so, but contend that by the addition of vitamins "A" and "D," which they take away

in their manufacturing process, and then replace, they have a product superior to the natural food, that it is a new product, and, therefore, superior to the natural product, and that the people of the State of Kansas, acting through their legislature, cannot prevent the manufacture and sale thereof, because the addition of such vitamins make the resulting product in that one respect better.

For such reasoning and conclusion petitions ask this court to follow the Weaver case, and say that they are denied due process of law. Such reasoning and contentions of the petitioners ask this court to invade the province of the legislative branch of government, and to exercise a discretion reposed by our system of government only in the legislature, and to determine what ought to be good for the people.

Whether an adulterated product, lacking in the many essential nutrients, should be sold for a natural product, whether the natural product should be protected by standards of identity, quality, purity and sanitation, when used by the people as a food, cannot be doubted to be a question for the legislature. To what extent these standard products should be protected from nonstandard, inferior, adulterated or insanitary substitutes, again is a question for the legislature, and not for the courts. To

what extent the people should be protected from acquiring a substituted, inferior, adulterated or unsanitary product, by reason of their ignorance, imposition, fraud, misrepresentation, or confusion, again is a question for the legislature, and not that of the courts.

It is not a question for the courts to weigh the evidence as to the need for protection, or to determine the remedy. It is not for the courts to determine if legislative conclusions are prudent or unwise. The only authority of the court is, first, to examine the facts to determine if there is any set of facts justifying the exercise by the legislature of its power, and if there are such facts, then, secondly, to inquire whether the means adopted by the legislature bears a reasonable relation to the object sought to be accomplished.

The facts in the case before the court show that petitioners' product does not comply with the standards of quality, identity and purity of the dairy product for which it is in fact substituted, and which is purchased by the consumer as and for the natural product, and is so used. These were the facts found by the Kansas court. They show the existence of the evil and the basis upon which the legislative discretion may be exercised by the legislature. The means adopted by prohibition bears a rea-

sonable relation to the end sought to be accomplished, that such standard product be made available to the people without being confused by an inferior substitute product which is indistinguishable. Cases herein cited show conclusively that the majority opinion of the Kansas court upon the facts found state the law applicable to the case on every issue presented, that the Weaver case and allied cases relied upon by petitioners are not applicable to the facts in the case at bar, and show that petitioners have presented no federal question not heretofore determined by the court; and that the Kansas decision is in accord with the applicable decisions of this court.

The record does not disclose any new special or important reason for granting by this court of a writ of certiorari.

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